

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
 Triangle Communication System, Inc.)	 DA 07-3791
Petition for FCC Agreement to)	
Redefine the Study Areas of Two Rural)	
Telephone Companies in Montana.)	

REPLY COMMENTS
OF
TRIANGLE COMMUNICATION SYSTEM, INC.

I. INTRODUCTION & SUMMARY

Triangle Communication System, Inc. (“TCS” or “TriCom”), by its attorneys, hereby responds to the comments submitted by the Montana Telecommunications Association (“MTA”) and the Alaska Telephone Association (“ATA”) in the above-captioned proceeding.¹ Both MTA² and ATA³ opposed the petition filed by TCS seeking Federal Communications Commission (“FCC”) agreement with the Montana Public Service Commission’s (“MPSC”) redefinition of certain wire centers as separate service areas of two rural telephone companies: Triangle Telephone Cooperative Association, Inc. (“TTCA”) and Central Montana Communications, Inc. (“CMC”).

The underlying theme of the comments filed by MTA and ATA is that TCS filed its Petition for Redefinition in order to manipulate the universal service program for self-serving purposes. Both MTA and ATA ignore the facts and evidence presented by TCS in its proceeding

¹ Comments Sought on a Petition by Triangle Communication System, Inc. to Redefine the Service Areas of Certain Rural Incumbent Local Exchange Carriers in Montana., CC 96-45, Public Notice, DA 07-3791 (August 29, 2007).

² Comments of the Montana Telecommunications Association, CC 96-45, DA 07-3791 (September 28, 2007) (“MTA Comments”).

³ Comments of the Alaska Telephone Association, CC 96-45, DA 07-3791 (September 28, 2007) (“ATA Comments”).

before the MPSC. Both parties simply reconstitute the same arguments that were presented in the MPSC's proceeding. The MPSC thoroughly considered these arguments, as well as all the other facts and evidence presented during the proceeding, and determined that redefinition of the study areas as proposed by TCS was clearly in the public interest. The MPSC affirmed its position twice -- with the issuance of its final order in the state proceeding and with its subsequent issuance of the order on reconsideration. There is simply no reason for the FCC to reconsider again these arguments, upon which the MPSC has twice issued a unanimous ruling.

MTA also suggests that the FCC should dismiss the TCS petition on procedural grounds pending the conclusion of the action filed by MTA in a Montana district court. The MPSC order is final. It sets a positive precedent for rural study area redefinitions in Montana. It is not in the public interest to postpone further the ability of consumers to receive the benefits of TCS's cellular communications in the extremely rural area for which TCS seeks redefinition. MTA seeks to further delay this proceeding. MTA's arguments are without merit. Accordingly, MTA urges the FCC to grant TCS's Petition for Redefinition.

II. MTA's COMMENTS ARE PROCEDURALLY DEFECTIVE AND SHOULD BE STRICKEN FROM THE RECORD

At the outset, MTA's comments are procedurally defective. The FCC's rules require that any document filed with the FCC must be signed and dated.⁴ If a document is not signed, the FCC may strike that document as sham and false and the matter may proceed as though the document had not been filed.⁵ MTA neither signed nor dated its comments. Accordingly, the FCC should strike MTA's comments and not consider them as a part of this proceeding. Should the FCC nonetheless choose to consider MTA's Comments, TCS responds to those comments below.

III. TCS RESPONSE TO COMMENTS

A. The TCS petition is not premature and should be considered by the FCC.

The Petition was timely filed and is ripe for adjudication. On May 8, 2007, the MPSC adopted its Order granting TCS's ETC petition for redefinition of study areas and designating

⁴ 47 C.F.R. § 1.52.

⁵ *Id.*

TCS eligible for receipt of Federal universal service funds.⁶ On July 26, 2007, the MPSC issued its Final Order on Reconsideration which affirmed the holdings of its Order.⁷ Accordingly, the MPSC's proceeding designating TCS as an ETC and redefining the study areas of two rural telephone companies in Montana is closed and the Orders issued by the MPSC are final. Indeed, MTA could not have appealed the Orders if they were not final.⁸ Pending litigation of final agency action does not undo the finality of that decision. The MPSC Orders are final unless and until a district court issues an order to the contrary.⁹ In the meantime, it is not premature for the FCC to act on the pending petition. To allow MTA to delay the proceeding by filing appeal after appeal delays TCS from receiving universal service funds and denies citizens of rural Montana the benefits of improvements to and expansion of TCS's wireless service. Justice delayed is justice denied.

B. There is no need for the FCC to initiate another proceeding to re-examine the TCS petition filed before the MPSC.

MTA suggested the FCC "initiate its own proceeding to conduct an independent analysis of the TCS petition on its own merits."¹⁰ As previously explained, the MPSC has issued its Order establishing the redefinition of the study area for TCS's ETC designation and reaffirmed that decision with its Final Order on Reconsideration. The Orders culminated a proceeding that spanned three years.

Now, on the heels of the two MPSC Orders rejecting its unsubstantiated arguments, MTA brings those same arguments before the FCC and boldly suggests that yet another proceeding be initiated so the FCC can replicate the analyses already conducted by the MPSC. Not only did the MPSC carefully weigh the merits of TCS's petition against the stringent standards of the MPSC's own ETC rules, but as even a cursory review of the MPSC's orders in the case reveals, the MPSC also ensured the petition satisfied the FCC's ETC rules and guidelines.

⁶ *In the Matter of the Application of Triangle Communication System, Inc. Application for Designation as a Eligible Telecommunications Carrier*, Docket No. D2004.1.6, Final Order Designating Eligible Telecommunications Carrier, Order No. 6723a (May 8, 2007) ("Order").

⁷ *In the Matter of the Application of Triangle Communication System, Inc. Application for Designation as an Eligible Telecommunications Carrier*, Docket No. D2004.1.6, Final Order, Order on Reconsideration, Order No. 6723b (July 26, 2007) ("Final Order on Reconsideration").

⁸ *Dalton v. Specter*, 511 U.S. 462 (1994) (Section 704 of the Administrative Procedure Act provides for judicial review only of final agency action).

⁹ Montana Public Service Commission Procedural Rule, 38.2.4806, Administrative Rules of Montana.

¹⁰ See MTA Comments at 1-2, 16.

Further, if the FCC initiates a proceeding under Section 54.207(c)(3), the FCC will merely duplicate what has already been done in the current proceeding. The FCC has already given public notice of and sought comment on TCS's petition. At the request of the FCC, TCS also provided supplemental information regarding its population density analysis. The record in this proceeding is complete. A Section 54.307(c)(3) proceeding will add nothing to the existing record and only further delay grant of TCS's petition. A Section 54.307(c)(3) proceeding is both unnecessary and redundant.

C. MTA's assertion, twice rejected by the MPSC, that the TCS petition constitutes cream-skimming is without merit.

There is no evidence to support the statement by MTA that TCS seeks to serve only the low-cost, high revenue portions of the incumbents' study areas. TCS proposes to serve very rural portions of Montana. TCS's proposed ETC service area does not include any urban or metropolitan areas. In fact, the most densely populated wire center in TCS's proposed ETC service area has a population density of 8.34 persons per square mile, hardly the "cream" of potential service areas.¹¹ This argument by MTA was previously presented to and rejected by the MPSC.¹²

TCS did not pick and choose the most lucrative exchanges to serve.¹³ It will serve *all* the ILECs' exchanges that fall within its 800 MHz licensed area, including the areas within those exchanges that are presently unserved by any wireless carriers.¹⁴ While MTA argues in its comments that TCS should not be allowed to redefine the study areas of TTCA and CMC since it

¹¹ See Letter to Marlene R. Dortch, Office of the Secretary from TCS, CC Docket No. 96-45 at 2 (September 28, 2007).

¹² See Final Order on Reconsideration at 19-20 (finding "no evidence that TCS has failed [the] FCC test for cream skimming").

¹³ Richard Stevens, General Manager of TCS, explained:

"TriCom is absolutely committed to serving rural Montana and has no intention of 'cherry picking' densely populated areas over areas that are less densely populated. The only reason we do not seek ETC designation for [TTCA] and CMC's entire service areas is that the particular configuration of our existing network, the boundaries of our licenses, and the manner in which other wireless carriers in the area have configured their networks all combine to make it more sensible for TriCom to apply to serve an area that includes only certain wire centers within the current service areas of [TTCA] and CMC."

¹⁴ As noted in its ETC Petition and in the testimony of Richard Stevens, TCS simply does not hold licenses for 800 MHz spectrum that would enable it to offer service throughout the incumbents' entire study areas. TCS is committing to provide service throughout the areas in which it does hold 800 MHz wireless licenses and it will seek additional 800 MHz licenses so that it may provide service in unserved areas in which it does not currently have 800 MHz licenses.

owns wireless licenses that cover those entire study areas,¹⁵ this argument has again been addressed and rejected by the MPSC. First, as stated on Page 8 of the MPSC’s Final Order on Reconsideration, TCS “does **not** hold ‘wireless licenses’ for the entirety of TTCA’s and CMC’s study areas.” (emphasis added) Second, the other spectrum held by TCS – licenses in the 700 MHz and 1900 MHz bands – is not suitable for the provision of universal service. 700 MHz spectrum is currently used almost exclusively for mobile video and high speed Internet access, and there is no equipment available to offer the type of voice service currently offered by TCS over a 700 MHz network. Due to the propagation characteristics of 1900 MHz spectrum, it is not economically feasible for TCS to utilize such spectrum for the provision of voice services. MTA has failed to cite any legal precedent, either in its comments to the FCC, or in the MPSC proceeding, that would indicate TCS’s request for study area redefinition should be denied simply because it owns other spectrum that it has determined would be unsuitable for universal service offerings. As the MPSC concluded, the public interest is not served by denying consumers residing within TCS’s proposed redefined study area access to wireless telecommunications service, simply because TCS cannot economically or technologically provide universal service using some other licensed spectrum.¹⁶

MTA also appears to argue that the decision by the incumbent carriers not to disaggregate their study areas subsequently imposes in all cases an obligation for regulatory agencies to examine the extent to which the incumbents *may* have disaggregated when making any cream skimming determination. The extent to which incumbents may have disaggregated was examined by the MPSC. The MPSC determined that the lack of disaggregation had no bearing on the existence or nonexistence of cream skimming.¹⁷

D. TCS has submitted a population density analysis to support its petition for redefinition.

MTA incorrectly argues that the redefinition request is “deficient” due to the lack of a population density analysis. TCS is a small rural wireless carrier proposing to serve an extremely rural, sparsely populated area. At the time of its filing with the MPSC, TCS did not have access to density data by population within each exchange of the incumbent carriers. It

¹⁵ MTA Comments at 9.

¹⁶ Final Order on Reconsideration at 20-21.

¹⁷ *Id.* at 6; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46 ¶ 51 (March 17, 2005).

therefore submitted density information that it had available: density data based on the population of the counties encompassed within the exchanges and density data based on the incumbents' subscriber densities. While the MPSC stated that it will expect any future application to redefine a study area to include density data,¹⁸ it recognized that there is currently no requirement that such data be submitted, and found that the data submitted by TCS supported the conclusion that cream skimming was unlikely.

Further, pursuant to a request by the FCC, TCS has filed additional population density information in this proceeding.¹⁹ The population density information submitted by TCS supports the MPSC's finding that cream skimming is unlikely.²⁰

E. There is no requirement that TCS offer service on its own facilities.

MTA's contention that TCS is not offering service on its own facilities is both factually incorrect and irrelevant. There is no requirement that ETCs offer service using exclusively their own facilities. MTA has cited to no such precedent, and the FCC's grant of ETC status and redefinition requests to carriers that operate their own networks using both owned and leased facilities clearly contradicts any such contention.²¹

For the record, TCS notes that MTA's assertions that TSC "has made it clear that it is applying for redefinition and for ETC designation based on its use of other carriers' facilities"²² is a gross misinterpretation of the evidence and facts that were presented in the MPSC proceeding. The record in the MPSC proceeding demonstrates that TCS operates its own network using both owned and leased facilities.

TCS owns the wireless facilities (radios, batteries, transmitters, etc.) at each of its sites. TCS leases other facilities such as some of the tower structures and capacity on the central wireless switch in Glasgow, Montana. All of the assets associated with the new construction will be owned by TCS. All Universal Service support received by TCS will be used to provide

¹⁸ Final Order on Reconsideration at 11.

¹⁹ See Letter to Marlene R. Dortch, Office of the Secretary from TCS, CC Docket No. 96-45 at 2 (September 28, 2007).

²⁰ *Id.*

²¹ See, e.g., *In re Federal-State Joint Board on Universal Service, Advantage Cellular Systems, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the state of Tennessee*, FCC Docket No. 96-45, Order, DA 04-3357 (October 22, 2004) ("Advantage Order")

²² See generally MTA Comments on the TCS Petition at 13.

service in its newly designated ETC area and to extend service to customers in areas where it is currently not available.²³

It is common practice in the telecommunications industry (both wireline and wireless) that the vast majority of providers lease some part of their network from other entities. When a telecommunications provider refers to “its network,” that network includes all of its facilities, whether those facilities are owned outright or leased from another. Contrary to MTA’s interpretation, leasing equipment is totally different from engaging in resale. Leasing equipment does not constitute resale of telecommunications.²⁴

F. The policy issues raised by MTA and ATA are outside the scope of this proceeding.

Both MTA and ATA argue that TCS is attempting to manipulate the current USF program to subsidize its complementary wireless service. Further, both MTA and the ATA cite current problems with the USF program such as exponential growth of the fund. TCS is also very cognizant of the growth of the USF. However, these policy considerations should be addressed in the FCC’s USF proceedings including its proposal to cap the USF or utilize reverse auctions. The 1996 Telecommunications Act and the FCC’s rules allow state commissions to designate wireless carriers as ETCs and redefine rural study areas. According to those rules, the MPSC found that TCS met the requirements for ETC designation and redefinition. The “policy issues” raised by MTA and ATA are outside the scope of this proceeding.

IV. CONCLUSION

Having its arguments rejected by the PSC, MTA now turns with the same arguments to the FCC. The MPSC unanimously rejected arguments identical to those that MTA and ATA now make before the FCC. The MPSC has already determined that there is no evidence to support the argument that TCS’s petition for redefinition is likely to result in cream skimming. There is no support for the position that TCS must choose between serving the entire incumbents’ study areas or serving none of the area and no precedent for denying consumers access to wireless telecommunications simply because TCS cannot economically or technologically provide universal service throughout the entire study area of the incumbents.

²³ Testimony of Richard Stevens at 4-6.

²⁴ See Advantage Order.

TCS is a facilities based carrier and has committed that it will deploy services using its own facilities to areas currently unserved including exchanges serving Native Lands. There is no attempt by TCS to "game the system" or distort the truth for self-serving purposes. No other CETC, wireline or wireless, has been designated for the exchanges identified for redefinition.

The MPSC has determined that designating TCS as an ETC within the redefined study area is in the public interest. TCS urges the FCC to concur with the decision of the MPSC to redefine the study areas of the incumbent telecommunications providers so that TCS may respond to consumer requests for cellular communications within these rural exchanges.

Respectfully submitted,

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Dated: October 15, 2007

Declaration of Richard Stevens

I, Richard Stevens, do hereby declare under penalty of perjury the following:

1. I am the General Manager of Triangle Communication System, Inc.
2. I have read the foregoing "Reply Comments of Triangle Communication System, Inc." I have personal knowledge of the facts set forth therein, and believe them to be true and correct.

A handwritten signature in black ink, appearing to read "R. Stevens", written over a horizontal line.

Richard Stevens

Oct 15, 2007

Date: October 15, 2007

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Bennet & Bennet, PLLC, 4350 East West Highway, Suite 201, Bethesda, MD 20814, hereby certify that a copy of the foregoing Reply Comments of Triangle Communication System, Inc. was served on October 15, 2007, by first-class United States mail, postage prepaid, to those listed below:

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